

ORIGINAL

FEDERAL MARITIME COMMISSION

NEW ORLEANS STEVEDORING COMPANY

Complainant

v.

BOARD OF COMMISSIONERS OF
THE PORT OF NEW ORLEANS

Respondent.

Docket No. 00-1 1

Served: June 28, 2002

ORDER

I. INTRODUCTION

This proceeding was initiated by a complaint filed on September 25, 2000, by New Orleans Stevedoring Company ("NOS" or "Complainant") against the Board of Commissioners of the Port of New Orleans ("Board" or "Respondent"). In its complaint, NOS alleged that Respondent unreasonably refused to deal or negotiate with NOS in violation of section 10(d)(3)¹, and provided an unreasonable preference or advantage in violation of section 10(d)(4)² of the Shipping Act of 1984 ("Shipping Act"), 46

¹Section 10(d)(3) makes the prohibition in section 10(b)(10) applicable to marine terminal operators.

Section 10(b)(10) provides in pertinent part that: No common carrier, either alone or in conjunction with any other person, directly or indirectly, may -

(10) unreasonably refuse to deal or negotiate.

²Section 10(d)(4) provides that: No marine terminal operator may give any undue or unreasonable preference or advantage or impose

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U.S.C. app. §§ 1709(d)(3) and (d)(4). NOS averred that Respondent refused to allow it to use certain marine terminal facilities along the Mississippi River ("River"), and violated its tariff by refusing to consider NOS' berth application for individual vessels, thereby preventing it from obtaining terminal or stevedoring business, which ultimately led to its going out of business. Respondent filed an Answer on October 19, 2000, in which it addressed NOS' allegations.

On June 27, 2001, Administrative Law Judge Paul B. Lang ("ALJ") issued an Initial Decision ("I.D.") in which he dismissed NOS' complaint. The XLJ found that Respondent did not violate the applicable sections of the Shipping Act by refusing to deal or negotiate with Complainant or by providing an unreasonable preference or advantage to other marine terminal operators ("MTOs"). This proceeding is now before the Commission on exceptions and reply thereto. For the reasons set forth below, we affirm the ALJ's dismissal of the complaint.

II. BACKGROUND

NOS is a division of James J. Flanagan Shipping Corporation and is franchised to do business under the laws of the state of Louisiana. Complaint at 1. NOS operated as both an MTO and stevedore in the Port of New Orleans. Respondent exercises control and authority over the port's maritime facilities, including leasing or otherwise assigning, pursuant to its tariff, the use of such facilities in the business of furnishing wharfage, dock, warehouse and other terminal facilities. Id.

NOS alleged that until May of 1999, it leased two adjoining wharf facilities on the River, each comprising wharf and shed space ("Napoleon A and B"), where it had conducted business for over 100 years. Upon expiration of the lease, NOS requested a new lease for only the space comprising Napoleon A's wharf and

any undue or unreasonable prejudice or disadvantage with respect to any person.

marshalling yard. At that time, Respondent allegedly indicated that it desired to lease the A and B facilities as one unit. Rather than lease both units, NOS elected to become a preferential assignee of the two facilities, under Respondent's tariff, which NOS claimed was more profitable for Respondent than a lease.

NOS contended that in August of 1999, it sought to lease Napoleon A and B. NOS claimed that, upon receiving NOS' request, Respondent indicated that due to "fairly immediate and extensive reconstruction," it did not intend to make any additional commitments for space assignments at Napoleon A and B. Id. at 3.

NOS further averred that Respondent indicated that the space would not be available to any party in order to facilitate a "fast-track construction schedule." Id. at 4. NOS claimed that Respondent told NOS to vacate Napoleon A and B, as Respondent had no intentions to lease or assign any space due to construction activity. NOS claimed that after it vacated Napoleon A and B, it observed other competitors using the space for berthing vessels, unloading and storing cargo, and parking and storing equipment vehicles. NOS further claimed that it observed its competitors servicing vessels of former customers of NOS, whose business NOS claimed it lost due to its exclusion from Napoleon A and B.

Due to its exclusion from Napoleon A and B, NOS contended that it made several unsuccessful attempts to locate alternative facilities on the River, including Napoleon C, the neighboring marshalling yard, a space known as the Foreign Trade Zone ("FTZ"), and an area known as the "grassy area," which is a small area of unimproved land used to store items of relatively light weight. NOS asserted that due to Respondent's refusal to lease or assign riverfront terminal space, it has been unable to service and therefore to obtain terminal or stevedoring business and is no longer in business. NOS further asserted that as a result of Respondent's refusal to lease or assign it terminal space, NOS incurred damages, and it sought reparations in the amount of

\$1,000,000 plus any additional damages that may be proved, in addition to interest, attorneys' fees and any other sum as the Commission may deem appropriate.

III. INITIAL DECISION

With respect to the allegation of a section 10(d)(3) violation, the ALJ stated that NOS was aware of Respondent's policy of not allowing either leases or short term assignments of Napoleon A and B while its decision to undertake a major renovation was still pending. I.D. at 17. The ALJ noted that Respondent had this policy in place because it did not want to risk delaying construction, but would accommodate lessees to minimize the disruption to their operations. The XLJ stated that while Respondent's policy might be characterized as "overly conservative, inflexible, and insufficiently responsive" to entities such as NOS, it could not be rationally characterized as unreasonable or as being unrelated to legitimate transportation considerations. Id.

The ALJ addressed NOS' argument that Respondent's policy was a guise to steer its business to another MTO, P & O Ports ("P&O"), as an enticement to make a large capital investment in the Napoleon A and B renovation project. The ALJ found that NOS' theory failed for two reasons. First, there was no evidence indicating that Respondent did not evenly apply its policy. Second, the evidence indicated that the company to which NOS claimed it lost its business was prepared to do business with any MTO on the River that was capable of servicing its vessels. The ALJ concluded that while Respondent may have wanted another MTO to invest in the Napoleon A and B renovation project, Respondent's refusal to allow NOS to use Napoleon A was motivated by its desire to minimize any disruptions with the possible construction, and its interest in leasing the facility in its entirety, if the renovation project did not proceed.

The ALJ next addressed whether Respondent gave any

undue or unreasonable preference or advantage or imposed any undue or unreasonable prejudice or disadvantage in violation of section 10(d)(4). The ALJ stated that a finding of reasonableness, whether in the context of an alleged refusal to deal or negotiate or of an alleged preference or advantage, is dependent upon specific facts rather than broad generalizations. I.D. at 20. See All Marine Moorings, Inc. v. IT0 Corn. of Baltimore, 27 S.R.R. 539, 545 (1996) (reviewing the factors that have been considered by the Commission when determining reasonableness).

The ALJ noted that NOS argued in its Reply Brief that certain MTOs received preferential treatment because they did not have a lease on any portion of Napoleon A and B and that Respondent owed them no legal duty to provide assigned space. Id. The ALJ stated that NOS' former argument ignored the fact that the assignments were intended to make up for the use of leased space affected by the construction project. The ALJ further stated that the latter argument had no relevance to the issue of whether Respondent violated the Shipping Act in granting preferential treatment to current lessees. The ALJ noted that Respondent was entitled to attempt to compensate its lessees for the loss of space and to encourage MTOs to assume the obligations associated with long term leasing. Id.

The ALJ next addressed the allocation of space located within the FTZ. The FTZ, which is an area specially designated with the approval of the U.S. Customs Service, is an area for the storage of cargo that would either be transshipped out of the country without customs clearance or altered before clearance. NOS had temporary access to the FTZ, which is also used for short term storage for overflow maritime cargo from lessees. The ALJ noted that while Respondent elected to modify an assignment agreement with the assignee of the FTZ, which specifically prohibited handling, storage or other activity with regard to maritime cargo, ultimately affecting NOS' usage of the FTZ for storage of its cargo, the modification was due to Respondent's desire to maintain control of the FTZ so that its special status would not be jeopardized, rather than as an act of

animosity directed towards NOS. Id. at 22.

The ALJ next addressed NOS' allegations concerning the grassy area, an area of unimproved land, which at times cannot support heavy cargo. This area needed improvements, and because NOS expressed an interest in using this area, Respondent invited NOS to submit a detailed proposal for improving it. The ALJ stated that NOS failed to submit such a proposal and further proposed to use the grassy area in its current condition. Consequently, Respondent rejected NOS' proposal.

The ALJ noted that NOS cited certain portions of Respondent's tariff in support of its proposition that Respondent acted unreasonably in allocating marine terminal facilities. After reviewing the specific tariff items, the ALJ concluded that Respondent correctly adhered to its tariff and its actions were a result of its desire to minimize interference with construction and not out of general animosity towards NOS.

The ALJ further noted that upon the expiration of NOS' lease, NOS had received repeated extensions of deadlines to vacate the marine terminal facilities. The ALJ opined that if Respondent sought to treat NOS in an unfair or discriminatory manner, the extensions would have never been granted. The ALJ maintained that it was unnecessary to discuss the merits of NOS' claim for reparations, as he found that Respondent did not act unreasonably within the context of the Shipping Act. Id. at 25. The ALJ concluded that NOS had the option of leasing space along the canal that while admittedly less desirable than that along the River, would have allowed NOS to stay in business.

IV. EXCEPTIONS AND REPLY

1. NOS' Exceptions

NOS makes essentially three arguments in its exceptions. First, NOS claims that in 1999, Respondent refused to allow NOS, which was operating on assignment at Napoleon A and B,

to continue servicing the ships of Mediterranean Shipping Company (“MSC”), one of the largest container carriers calling at the port. NOS further claims that Respondent wanted MSC’s business to go to another MTO. Second, NOS asserts that at the end of May 2000, Respondent terminated its assignment at Napoleon A and B, alleging that redevelopment plans required that the facility remain unoccupied. NOS avers that this rule was rigidly enforced against it, but not against its competitors, who were permitted to use the facility throughout the period and to date. Third, NOS argues that Respondent violated its tariff when it refused to approve NOS’ applications to berth ships and marshal cargo off the facility, on the basis that NOS needed a long term solution to its space problem and that individual “ad hoc” applications would no longer be considered.

2. Respondent’s Reply to NOS’ Exceptions

Respondent asserts that NOS’ claim that it violated the Shipping Act by unreasonably refusing to permit NOS to move MSC to the Napoleon facility is meritless, because NOS failed to note that Respondent denied another MTO, Ceres, its request for a short-term lease for the same space NOS requested. Respondent further asserts that NOS failed to mention the numerous other factors Respondent considered, including *inter alia*: the extensions and accommodations given to NOS; the Board’s history of expensive construction/cargo conflicts; and NOS’ decision not to renew its own lease.

Respondent contends that NOS has failed to demonstrate that it violated section 10(d)(4) because it has not established that NOS was unreasonably disadvantaged. Respondent further contends that in order to prove a section 10(d)(4) claim, NOS must show a triangular relationship in which it is disadvantaged relative to a competitor. In this instance, Respondent asserts that NOS must show that Respondent unreasonably disadvantaged NOS as compared to an entity that is sufficiently similarly situated to NOS to establish a valid basis for comparison. Respondent’s Reply to NOS’ Exceptions at 29 (citing Ceres Marine Terminals,

Inc. v. Maryland Port Admin., 27 S.R.R. 1251 (1997), aff'd in part, rev'd in part on other grounds and remanded, 28 S.R.R. 545 (4th Cir. 1998)). Respondent further contends that the Commission has long accorded substantial deference to a public port's business decisions. Id. (citing Petchem. Inc. v. Canaveral Port Authority, 23 S.R.R. 974, 987 (1986), aff'd sub. nom., Petchem. Inc. v. Federal Maritime Comm'n, 853 F.2d 958 (1988)).

Respondent avers that after NOS opted not to renew its lease, it sought to lease Napoleon A only, and only after several other MTOs sought to lease the entire Napoleon complex did NOS also seek to lease the entire complex. Respondent claims that it did not lease the complex to Complainant or any other MTOs that inquired. Respondent further avers that once it decided not to lease the terminal space to any MTO pending its decision regarding the construction of a new terminal on the Napoleon A and B site, NOS was nonetheless permitted to stay in the space until May 2000, when Respondent obtained a court order to evict NOS.

Respondent contends that NOS' claim that its competitors were given an unreasonable advantage is belied by a review of the record. Respondent claims that P&O was a lessee; therefore, Respondent was legally obligated to provide it with space either within or outside the leasehold area. As NOS was not a lessee, Respondent asserts that it had no greater legal claim to any part of Napoleon A and B than any other MTO.

Respondent further contends that NOS' assertion regarding an unreasonable advantage given to another one of its competitors, Gateway, is also flawed. Gateway was given space in Marshalling Yard C after the public belt railroad access to Gateway's terminal was cut off. Id. at 40. Under the terms of Gateway's lease, Respondent maintains that it guaranteed Gateway rail access via a rail spur at the rear of the Napoleon C shed. The demolition activity rendered the tracks nearest the wharf out of service. In order for Gateway to access the rail tracks near the Napoleon A and B yards, it had to load the cars from Marshalling

Yard C. Respondent contends that as the lease guarantee forced it to negotiate a solution to the rail access problem, the least expensive and disruptive solution was to allow Gateway to load rail cars from Marshalling Yard C.

Respondent also addresses NOS' exception regarding one or more tariff violations by refusing berth applications and/or space. Respondent asserts that its refusal to permit use of the FTZ and grassy area was not unreasonable within the meaning of the Shipping Act.

V. DISCUSSION

The issue presented is whether the ALJ properly dismissed NOS' complaint. We find that the ALJ's decision was supported by the record and therefore affirm the dismissal of the complaint in this proceeding.

A. Section 10(d)(3)

The ALJ found that the Shipping Act does not guarantee "the right to enter into a contract, much less a contract with any specific terms. . . [A]ll that is required is that common carriers, ocean transportation intermediaries ("OTIs") and MTOs refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors." I.D. at 16. After a review of the record, we believe that although NOS was "shut out," it was done for legitimate, transportation-related reasons.

In its exceptions, NOS argues that Respondent's refusal to allow it to use Napoleon A and B to service the MSC vessels constituted an unreasonable refusal to deal, and it provides a detailed explanation supporting its contention. NOS concedes that Respondent pursued P&O as a potential lessee, but further argues that the violation occurred when MSC was forced to move to P&O, and when NOS was prohibited the interim use of the Napoleon yards, which NOS claims Respondent's own analysis revealed was feasible. NOS further contends that withholding

available public facilities violated the terms of its tariff, item 312 in particular, and constituted an unjustified refusal to deal, as well as an undue preference for P&O.

Respondent argues in its reply that NOS failed to acknowledge that Ceres, another MTO, requested a short-term lease for the same space for the MSC business several weeks before NOS requested it, which request was also denied. Respondent further maintains that NOS failed to recognize that it considered numerous other factors when evaluating NOS' request, which shows that its actions were reasonable in the circumstances.

Respondent cites Seacon Terminals v. The Port of Seattle, 26 S.R.R. 886 (1993), in support of its proposition that NOS must show unreasonableness with respect to Respondent's conduct. Respondent's Reply to Exceptions at 28. In Seacon, the MTO, Seacon, alleged that the Port of Seattle unlawfully excluded it from the port, refused to deal, and unlawfully discriminated against Seacon by giving its competitors more favorable lease terms, all in violation of the Shipping Act. Seacon, 26 S.R.R. at 887. The administrative law judge found that after Seacon's original lease ended, the port continued to hold the area in question open to Seacon, hoping that Seacon would commit to a long-term lease; however, Seacon declined to enter into a long-term lease for the space it occupied. The port then sought to lease the space to another MTO, after which time Seacon sought to lease the space. In making his determination, the administrative law judge considered testimony from various individuals and found that the port commissioners and staff all agreed that Seacon's proposal for the space was too late.

Seacon is factually similar to the instant case. O S had an opportunity to renew its lease for the Napoleon complex. Instead, it opted to operate on an assignment arrangement because of an anticipated decline in business. NOS' Exceptions at 3. NOS received notice from Respondent that its assignment arrangement would be subject to the terms of the tariff and to the

availability of space as determined by the Board. I.D. at 8. NOS sought several times to lease only Napoleon A of the Napoleon A and B complex and was told by Respondent that it preferred to lease the entire complex. Only after Ceres expressed interest in leasing Napoleon A and B did NOS apply to lease the facility in its entirety. Furthermore, Respondent indicates that in the past, it has had construction projects that have been costly when they occur in an ongoing cargo operation area. Based on an evaluation of the facts, there is nothing to support NOS' contention that Respondent unreasonably refused to deal with it. Rather, the Board's determination not to lease the complex was a reasonable determination in view of the pending construction project. Therefore, we affirm the ALJ's finding that Respondent did not violate section 10(d)(3).

B. Section 10(d)(4)

With respect to the alleged unreasonable preference or advantage, the ALJ stated that the threshold criterion for unreasonable preference or advantage was established in Volkswagenwerk v. Federal Maritime Comm'n, 390 U.S. 261 (1968). In that case, the Supreme Court stated that "discriminatory treatment will not be found to exist in the absence of a determination that a third party has enjoyed an unfair advantage over the complainant. The favored entity need not have been in direct competition with the complainant, but it must have been similarly situated in that both were seeking the benefit which was denied to the complainant." See Id. at 19 (citing Volkswagenwerk, 390 U.S. at 279).³

³The ALJ noted that while a competitive relationship need not be present to demonstrate an unreasonable preference or advantage, the parties must have been similarly situated. The Commission, however, has held that the parties need not be similarly situated nor does a competitive relationship need to exist to challenge alleged unreasonable preferential or prejudicial treatment in certain situations. See e.g., Ceres, supra, at 7; Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V., 25 S.R.R. 3308 (1990); and Valley Evaporating Co. v.

The ALJ stated that a determination of reasonableness is largely dependent upon specific facts rather than broad generalizations. The XLJ maintained further that with respect to determining a port's reasonable business decision, the Commission will not substitute its own business judgment for that of an entity that is responsible for the daily operation of a port, nor will it avoid its responsibility to determine whether a Shipping Act violation occurred. See Id. at 20 (citing Petchem. Inc. v. Canaveral Port Authority, 23 S.R.R. 974 (1986)).

NOS asserts that upon notice of the termination of its assignment, Respondent indicated that should construction occur, the space would not be available to any party. NOS further asserts that this rule was "rigidly enforced" against it, but not against any of its competitors. NOS' Exceptions at 27. NOS contends that the vessels that it was not permitted to unload, even away from the Napoleon premises, were allowed to unload once those carriers had secured a different MTO. Id. at 30. NOS specifically addresses the occupation of Napoleon by MTOs P&O and Gateway, and Saudi Line's Ro-Ro ships. NOS claims that they were permitted to use space within the Napoleon complex, when it was not.

In its reply, Respondent addresses NOS' assertion that several of its competitors received an unreasonable advantage. Respondent states that because P&O was a lessee, Respondent was legally obligated to provide a certain amount of space to P&O, when the entire space contained in its lease became unavailable due to unrelated construction. Respondent provided P&O the space in Napoleon A to fulfill its obligations to its lessee. Respondent submits that NOS, which was not a lessee, was not entitled to the same consideration.

Gateway, another one of NOS' competitors, was also provided access to space that NOS requested and was not

permitted to use. Respondent maintains that Gateway was allowed access to Marshalling Yard C because it needed rail access via a rail spur at the rear of the Napoleon C shed. Finally, from where the Saudi Line's Ro-Ro ship berthed, its stern gate rested on the Napoleon A wharf. Respondent notes that the wharf, which is space for the temporary placement of cargo until it is moved to a terminal or shed, is controlled by the Port, even when the yard is leased. Respondent avers that NOS had nowhere to dray its cargo, and on prior occasions, it had occupied all available areas with containers and cargo that remained until May 2000. Respondent avers further that even after NOS was evicted from Napoleon A and B, its gear remained in various places in the Port.

The ALJ held that it was not unreasonable for Respondent to restrict access to Napoleon A and B to lessees whose operations had been disrupted by the construction contractor. This holding is adequately supported by the record. NOS chose not to renew its lease, thereby choosing not to avail itself of the legal obligations it would have been entitled to receive as a lessee. It was reasonable for Respondent to conclude that its lessees were entitled to the allocation of space before NOS because the lessees have made a greater commitment to the Port through their lease terms. Moreover, Respondent was contractually bound by the terms of its leases with the lessees. The Commission has previously stated, when discussing granting deference to a port's business decisions, that it will not substitute its business judgment for that of the port when the complained-of policy or practice and resulting disparate treatment are not unreasonable. See I.D. at 20 citing Petchem, 23 S.R.R. at 989; James J. Flanagan Shinning Corp. v. Lake Charles Harbor and Terminal District, 27 S.R.R. 1123 (1997). In the instant case, Respondent was not acting unreasonably by choosing to allow its lessees, rather than NOS, to use the space in the Napoleon complex. Therefore, we affirm the ALJ's conclusion that Respondent did not violate section 10(d)(4).

C. Alleged Tariff Violations

After a review of Respondent's tariff, the XLJ concluded that the alleged violations did not occur and that the record was devoid of any evidence to suggest any violations. We agree with this assessment.

On exceptions, NOS contends that Respondent refused to grant its berth applications, in violation of Respondent's tariff. Upon NOS' assignment termination in April of 2000, NOS sought alternative areas to service its customers. It inquired about using the FTZ and the grassy area. NOS asserts that it was not permitted to use these areas because of excessive restrictions and stringent time limitations.

Respondent argues that NOS was using the FTZ, which is intended for FTZ cargo, not maritime cargo. The FTZ, Respondent contends, is not to serve as a marine cargo terminal area for continuous maritime cargo operations. The grassy area space that is available for cargo is a small area of unpaved Port property, which can only be used for chassis and empty containers. In order for this area to be utilized, substantial improvements would need to be made. Respondent claims it requested that NOS submit a proposal as to how it would make the necessary improvements to the grassy area, and to date NOS has failed to submit any proposal.

Respondent avers that allowing NOS to use the FTZ for long-term cargo storage would have exposed the Port to the loss of potential future FTZ business, and furthermore, because demurrage would not accrue when containers are placed in the FTZ, the Port would also have lost revenue. Respondent's Reply at 45.


We find that NOS' contention that Respondent violated its tariff is without merit. After reviewing the specific items in Respondent's tariff that NOS alleges were violated, the ALJ concluded that there was no evidence to indicate that any

violation occurred. NOS has not demonstrated in its brief on exceptions or exhibits that any such violation occurred. Therefore, we affirm the ALJ's finding that no tariff violation occurred.

VI. CONCLUSION

Based on the foregoing, we affirm the I.D as set forth herein. The ALJ properly found that Respondent did not violate sections 10(d)(3) and 10(d)(4) of the Shipping Act. While NOS has submitted a detailed brief on exceptions and numerous exhibits to support its argument, NOS has failed to provide any basis to warrant reversing the ALJ's initial finding. Therefore, we affirm the I.D. and dismiss NOS' complaint.

By the Commission.


Bryant L. VanBrakle
Secretary